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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

12 WAYNE SKILES,
13 Plaintiff,
14 v.
15 TESLA, INC. and EXPERIAN
16 INFORMATION SOLUTIONS, INC.
17 Defendants.

Case No. 3:17-cv-05434-who

**TESLA, INC.’S SUPPLEMENTAL REPLY IN
SUPPORT OF ITS MOTION TO DISMISS
PLAINTIFF’S FIRST AMENDED
COMPLAINT**

1 I. INTRODUCTION

2 After asking this Court for an additional opportunity to oppose Tesla's motion to dismiss (ECF
 3 No. 63, "Motion" or "Mot."), Plaintiff's Supplemental Opposition brief ("Supp. Opp.") expressly
 4 abandons one cause of action (DPPA), makes no attempt to support another (ECPA), and spends ten
 5 pages struggling to defend Plaintiff's Fair Credit Reporting Act ("FCRA") claim through clear
 6 misstatements of both the law and the allegations in the First Amended Complaint ("FAC"). In the
 7 end, this briefing only confirms that none of Plaintiff's claims are viable and dismissal is necessary.

8 The core defect of Plaintiff's FCRA claim is that the Act regulates only the disclosure of
 9 ***statutorily-defined "consumer reports,*** but the FAC alleges no facts suggesting that an Experian
 10 Mosaic Score could meet that statutory definition. Plaintiff first attempts to escape this flaw by
 11 arguing the Mosaic Score is a "consumer report" because Tesla used it for credit decisioning. As
 12 before, however, no allegation in the FAC remotely suggests Tesla used his Mosaic score for that
 13 purpose, and Plaintiff's arguments rest on demonstrable misrepresentations about what the FAC says.
 14 Next Plaintiff claims that, because Tesla allegedly used the Mosaic Score for "marketing and sales
 15 purposes," it was used for a FCRA-regulated "business transaction," making it a consumer report
 16 under Section 1681b(a)(3)(F)(i). This newfound argument is contrary to the authorities Plaintiff cites
 17 and other binding precedent, holding that only the initiation of an actual automobile purchase, not
 18 merely a test drive, qualifies as a FCRA "business transaction." Moreover, if mere use for "marketing"
 19 after a test drive was a use for a "business transaction," that would actually *defeat* Plaintiff's claim
 20 because the statute does not require consent to use a "consumer report" in such a transaction.
 21 Plaintiff's misunderstanding of FCRA blinds him to the implications of his own contrived argument.

22 Plaintiff next argues the Mosaic Score is a "consumer report" because Experian ***expected it to***
 23 ***be used*** for credit decisions. This argument rests on a combination of further flagrant
 24 misrepresentations of the FAC and documents extrinsic to the FAC. What is more, even the new
 25 evidence Plaintiff impermissibly seeks to import into the FAC supports dismissal. It shows that
 26 Experian did not expect Mosaic Scores to be used for establishing credit and that they are based on
 27 household- or ***neighborhood-level*** data, whereas Plaintiff concedes that a document must provide
 28 individual-level information to qualify as a "consumer report."

1 For these reasons and others laid out in the Motion and original reply brief (ECF No. 74,
 2 “Reply” or “Rep.”) Plaintiff’s claims are meritless. The Court should dismiss the FAC with prejudice.

3 **II. ARGUMENT**

4 **A. The Mosaic Score Is Not a “Consumer Report.”**

5 As Tesla argued in its Motion and Reply, and as Plaintiff now stipulates, to be a “consumer
 6 report,” a document must be “used, expected to be used, or collected in whole or in part for” credit
 7 decisioning or another FCRA-regulated purpose. (15 U.S.C. § 1681a(d)(1); Mot. at 20-21; Rep. at 13;
 8 Supp. Opp. at 2.) Tesla also argued and Plaintiff does not dispute that a “consumer report” must
 9 convey information about an individual. (Mot. at 24-25; Rep. at 15; Supp. Opp. at 8-9.) Plaintiff
 10 claims that the Mosaic Score meets these requirements because: (1) Tesla used the Mosaic Score as a
 11 factor in establishing credit, (2) Tesla used it in a FCRA regulated “business transaction,” and
 12 (3) Experian expected it to be used for credit decision-making. Plaintiff also reiterates his claim that
 13 the Mosaic Score provides individual-level information. Plaintiff is wrong on all counts.

14 **1. Plaintiff Never Alleged Tesla Used the Mosaic Score to Establish Credit.**

15 Plaintiff argues that “a reasonable inference can be drawn that Tesla utilized the Mosaic Score
 16 as a factor in establishing credit” because the Mosaic Score provides information about “factors
 17 lenders use in establishing credit” and Tesla “requested this detailed credit information at the test drive
 18 phase of the business transaction.” (Supp. Opp. at 3.) Plaintiff then claims, without citation to the
 19 FAC, that “[s]uch sales purposes contribute to the production of the result of a consumer eventually
 20 buying and financing a Tesla vehicle.” (*Id.*) In other words, Plaintiff appears to be arguing that,
 21 because Tesla obtained his Mosaic Score and theoretically *could have* used it for establishing credit,
 22 it can be inferred that Tesla did use Plaintiff’s Mosaic Score for that purpose. This argument fails.

23 Even if the Mosaic Score could have been used to determine Plaintiff’s creditworthiness (as
 24 explained below, it could not), Plaintiff *never alleged* that Tesla actually used the Mosaic Score for
 25 this purpose, or anything close to it. Plaintiff claims that he alleged that Tesla requested his Mosaic
 26 Score to assess whether he “was likely going to be able to finance the vehicle,” citing FAC paragraphs
 27 31 and 35. (Supp. Opp. at 3.) Yet neither of those paragraphs allege that fact in any way. (FAC ¶ 31
 28 (alleging use for “marketing and sales purposes”); ¶ 35 (simply saying Tesla uses the Mosaic Score

1 “as it sees fit”.) Indeed, Plaintiff did not even allege that Tesla *offers* credit services, or that he sought
 2 them, let alone that Tesla used his Mosaic Score to determine his eligibility for credit. Given the
 3 absence of any allegations suggesting that Tesla actually used Plaintiff’s Mosaic Score to make a
 4 “credit-related decision,” the Court should not and cannot infer that fact from the FAC. *See Ashcroft*
 5 *v. Iqbal*, 556 U.S. 662, 678 (2009) (“A claim has facial plausibility when the plaintiff **pleads factual**
 6 **content** that allows the court to draw the reasonable inference that the defendant is liable for the
 7 misconduct alleged. The plausibility standard . . . asks for more than a sheer possibility that a
 8 defendant has acted unlawfully.” (internal citations omitted and emphasis added)); *Moss v. United*
 9 *States Secret Serv.*, 572 F.3d 962, 971-72 (9th Cir. 2009) (complaint suggesting “mere possibility” of
 10 wrongdoing “is not enough”); Mot. at 22; Rep. at 13-14.

11 **2. Plaintiff Did Not Allege that Tesla Used the Mosaic Score in Connection**
 12 **With Any FCRA-Related “Business Transaction” Under Section 1681b.**

13 In addition to regulating information used for credit decisions (15 U.S.C. § 1681b(a)(3)(A)),
 14 FCRA regulates information used for a “legitimate business need . . . in connection with a business
 15 transaction that is initiated by the consumer” (15 U.S.C. § 1681b(a)(3)(F)(i)). Unable to escape his
 16 allegation that Tesla used his Mosaic Score only “for marketing and sales purposes” (FAC ¶ 31),
 17 Plaintiff argues that such use qualifies as a “business transaction” as defined by FCRA. (Supp. Opp.
 18 at 4.) Plaintiff cites no authority for his novel position, and the authorities he cites contradict his view.

19 The FTC Advisory Opinion on which Plaintiff relies establishes that marketing activities do
 20 not qualify as a FCRA-regulated business transaction. (*See* P’s RJN, Ex. B.) As the FTC explains, a
 21 “business transaction initiated by the consumer” does not begin until “it is clear both to the consumer
 22 and to the dealer that the consumer *is actually initiating the purchase or lease* of a specific
 23 vehicle. . . .” (P’s RJN, Ex. B at 2 (emphasis added).) Additionally, the FTC advises that “a request
 24 to ‘test drive’ a vehicle does not indicate an intent to initiate the purchase or lease of the vehicle,” nor
 25 does “comparison shopping” and asking “about prices and financing.” (*Id.* at 2.) Thus, the FTC itself
 26 defines “business transaction” in a manner that excludes Plaintiff’s test drive here.

27 Consistent with this guidance, the Ninth Circuit has interpreted the language in Section 1681b
 28 even more narrowly and recognized that “the majority of courts that have addressed the issue” have

concluded that, to qualify as a Section 1681b “business transaction,” “a transaction ‘must relate to one of the other specifically enumerated transactions in 1681a(d) and b(3), *i.e.*, credit, insurance eligibility, employment, or licensing.’” *Mone v. Dranow*, 945 F.2d 306, 308 (9th Cir. 1991) (declining to extend Section 1681b to include reports “used for ‘business, commercial, or professional purposes’”) (citing *Houghton v. New Jersey Mfrs. Ins. Co.*, 795 F.2d 1144, 1149 (3d Cir. 1986)). It went on to note that, according to the Third Circuit, “a ‘broad interpretation of the business transaction language of 1681b(3)(e) would render the specificity of 1681a(d) [defining ‘consumer report’] and b(3) meaningless’” and indicated that “[m]ost district courts have reached similar conclusions.” *Id.* This too defeats Plaintiff’s bid for a loose reading of FCRA that could encompass the alleged facts here.

The case Plaintiff relies on does not hold otherwise. In *Greenway v. Information Dynamics, Ltd.*, the court found that summaries of individuals’ check cashing histories that were disseminated with the purpose of “furnish[ing] subscribing merchants with information on consumers who may tender checks in payment for purchases so that the subscriber may decide whether or not to accept the check” were expected to be used “in connection with a business transaction—a purchase of goods or services—between the subscriber and the consumer.” 399 F. Supp. 1092, 1095 (D. Ariz. 1974). Thus, consistent with the FTC Advisory Opinion, the court in *Greenway* found that a “business transaction” existed where a customer had actually initiated the purchase of particular goods and tendered a check in payment. Nothing in the *Greenway* decision suggests that the definition of “business transaction” extends to mere marketing that has not yet culminated in a particular purchase.

Here, Plaintiff alleged only that he “brows[ed]” a Tesla showroom and agreed to test drive a vehicle. (FAC ¶¶ 17-19.) It is clear that, at the time of the alleged FCRA violation, he had not initiated a purchase or lease, and he certainly does not allege that Tesla used his Mosaic Score in connection with his eventual purchase. Thus, Plaintiff has not alleged that Tesla used his Mosaic Score in connection with a FCRA-regulated “business transaction” and cannot show that Tesla’s alleged use of the score for “marketing and sales purposes” (FAC ¶ 31), converts it into a “consumer report.”

3. Plaintiff Alleged No Facts Establishing that Experian Expected the Mosaic Score to Be Used to Establish Credit.

Plaintiff argued in his original opposition that the Mosaic Score is a “consumer report” under

1 FCRA Section 1681a(d)(1) because Experian *expected it to be used or collected for*” credit decision-making. (Opp. at 24 (emphasis added).) Tesla responded by arguing that Plaintiff’s scant allegations on this front were conclusory boilerplate. (Mot. at 22, Rep. at 13-14.) Plaintiff’s only new attempted rebuttal, (Supp. Opp. at 4-5), rests on extrinsic documents not cited in the FAC or subject to judicial notice, and is unavailing even with those documents.

6 First, Plaintiff asks the Court to infer that the Mosaic Score was expected to be used for credit decisions because it supposedly contains information “that lender’s [sic] use to determine credit 7 eligibility.” (Supp. Opp. at 5.) Plaintiff, however, then describes the contents of the Mosaic Score 8 solely by misstating the allegations in the FAC and pointing to extrinsic facts he never alleged. 9 Specifically, the Supplemental Opposition twice asserts that “the Mosaic Score conveys a consumer’s 10 age and income.” (Supp. Opp. at 3, 5.) However, the only supporting cites to the FAC are paragraphs 11 30 and 62, neither of which allege anything about age or income. (See FAC ¶ 30 (alleging that “data 12 factors include” unspecified “property characteristics, and summarized credit and automotive data”); 13 ¶ 62 (alleging unspecified information about “financial condition and credit worthiness (among other 14 factors”)). Plaintiff then cites snippets from the lengthy Mosaic USA E-Handbook, which was not 15 mentioned in, much less attached to, the FAC. Plaintiff cannot use this extrinsic document to add in 16 facts he never alleged. *See, e.g., Puma SE v. Forever 21, Inc.*, No. 17-cv-2523, 2017 U.S. Dist. LEXIS 17 211140, at *20 (C.D. Cal. Jun. 2, 2017) (“[E]ven if properly subject to judicial notice, the referenced 18 documents cannot be used to amend the FAC. . . . Rather than defend the adequacy of its allegations, 19 Puma’s reliance on *newly alleged facts* and extrinsic documents in its opposition brief suggests a tacit 20 admission that the FAC lacks the requisite pleadings necessary” (emphasis added)); *In re Turbodyne 21 Techs., Inc. Sec. Litig.*, No. 99-cv-00697, 2000 U.S. Dist. LEXIS 23020, at *30 (C.D. Cal. Mar. 15, 22 2000) (emphasis added) (“[C]ourts may not ‘take into account additional facts asserted in a 23 memorandum opposing the motion to dismiss.’”). 24

25 Moreover, if the Court considers this extrinsic evidence, it only proves that Experian did *not* 26 expect the Mosaic Score to be used for credit decisioning. Experian’s website advertises a different 27 Experian product, “Summarized Credit Statistics,” for “target[ing] consumers” for credit offers. (See 28 Supp. Opp. at 5; P’s RJD Ex. E at 1.) Unlike the Mosaic Score, which groups consumers into broad

1 categories like “credit aware” or “cash over credit” based on their household or neighborhood, the
 2 Summarized Credit Statistics provide detailed information about an individual’s finances, including
 3 his or her number of delinquent or bankrupt accounts, outstanding balances on open bank cards, and
 4 “Good vs. Bad Credit Score.” (*Compare* P’s RJN Ex. D, to Ex. E at 1.) The general information
 5 provided by the Mosaic Score bears no resemblance to this individualized and highly detailed
 6 information for evaluating creditworthiness.

7 Second, Plaintiff claims that Experian’s advertising demonstrates its intent that the Mosaic
 8 Score be used for credit decisions. However, Plaintiff then points to evidence proving that Experian
 9 specifically advertised the Mosaic Score as a ***target marketing tool***. (*See, e.g.*, Supp. Opp. at 4 (target
 10 marketing is “exactly what the Mosaic Score was created [for],” “Experian advertises [the Mosaic
 11 Score] as being a tool to focus a business’ ‘resources and increase site performance, maximize sales
 12 conversion, ***optimize consumer targeting to ensure that the right product offerings are matched to***
 13 ***the right audience.***”’ (emphasis in original)) (citing P’s RJN, Ex. D at 3); 5 (“Experian also advertises
 14 the Mosaic Score itself as being a tool to, ‘acquire, manage and develop profitable customer relations
 15 . . . maximize sales conversion . . . and identify investment opportunities.’”) (citing P’s RJN, Ex. D. at
 16 3).) That Experian advertised the Mosaic Score for marketing, not credit decisioning, demonstrates
 17 that it is ***not*** a “consumer report” as defined by Section 1681(a)(d)(1). *See supra* Section II(A)(2).¹

18 Additionally, Plaintiff’s attempt to avoid judicial notice of Experian’s express statement that
 19 its Mosaic Score ***should not*** be used for credit decisioning (Supp. Opp. at 6) is baseless. Tesla is not
 20 seeking judicial notice of Experian’s publicly available webpage for the truth of the statements made
 21 on it, but to show what Experian said to its customers regarding its expectations for their use of its
 22 marketing products. (Tesla’s RJN, Dkt No. 65 at 5.) Plaintiff cites no authority suggesting that the
 23 Court cannot take judicial notice of the Experian website for the purpose of determining what Experian
 24 told customers. Plaintiff also argues, without support, that a Court cannot take judicial notice of facts

25
 26 ¹ Plaintiff attempts to focus on a single sentence in Experian’s 189-page Mosaic USA E-Handbook
 27 noting that “[s]ources of the descriptive content include contributions from Experian Simmons,
 Hitwise, Auto Market Statistics and Summarized Credit Statistics.” (Supp. Opp. at 5; P’s RJN, Ex. D
 28 at 5.) Plaintiff identifies no instances where Experian actually advertises its Mosaic Score for
 determining credit eligibility, and a single mention of the fact that Experian’s Mosaic Score draws on
 some unidentified information from Experian’s Summarized Credit Statistics changes nothing.

1 that contradict the pleadings. Quite to the contrary, it is well-settled that the Court is “not [] required
 2 to accept as true allegations that contradict . . . matters properly subject to judicial notice.” *Daniels-*
 3 *Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010); *Sami v. Wells Fargo Bank*, No. 12-00108,
 4 2012 U.S. Dist. LEXIS 38466, at *10-11 (N.D. Cal. Mar. 21, 2012) (same); *United States v. S. Cal.*
 5 *Edison Co.*, 300 F. Supp. 2d 964, 970 (E.D. Cal. 2004) (same). Thus, Tesla’s request for judicial
 6 notice of Experian’s website was proper, and the Court should consider it for purposes of determining
 7 how Experian advertises the Mosaic Score.

8 Thus, the Supplemental Opposition cannot cure Plaintiff’s failure to allege facts supporting his
 9 conclusory and contradicted allegation that Experian expected the Mosaic Score to be used for credit
 10 eligibility. (See FAC ¶ 88.) Plaintiff’s own judicially-noticed documents, if they are considered,
 11 demonstrate that the Mosaic Score has little in common with actual credit statistics and that Experian
 12 expressly advertises it as a marketing tool, not as a means to determining credit eligibility.

13 **4. The Mosaic Score Does Not Provide Information About Individuals.**

14 Plaintiff does not dispute that, to be a “consumer report,” the Mosaic Score must convey
 15 information about an *individual* consumer. (Mot. at 24-25; Reply at 15; Supp. Opp. at 8-9.) Instead,
 16 he argues that the Mosaic Score meets this requirement because it provides individual-level
 17 information about a consumer’s “reputation and mode of living through the individual’s household
 18 data.” (Supp. Opp. at 8.) Plaintiff’s argument again rests on facts outside the FAC. (See Supp. Opp.
 19 at 8-9, citing solely RJD Ex. D.) Even putting that aside, Plaintiff’s documents prove him wrong.

20 As the Mosaic USA E-Handbook states, the data underlying the Mosaic Score is accurate only
 21 “*by either household or neighborhood.*” (P’s RJD Ex. D at 4 (emphasis added).) It does not provide
 22 individualized data, but rather general information about the household *or neighborhood* in which an
 23 individual resides. As a result, the Mosaic Score cannot provide any reliable information about a
 24 single individual’s “mode of living” or “reputation,” as Plaintiff claims. (Supp. Opp. at 8.) Similarly,
 25 Plaintiff’s claim that 45 of the Mosaic Score categories are “households with a size of one person” is
 26 false. Despite the E-Handbook’s generalization that these categories include households with an
 27 average size of “1 person,” many of those categories include both “singles and couples” and do not
 28 distinguish between the two. (See, e.g., P’s RJD Ex. D at 121, 129.) Because two housemates may

1 have different ages, incomes, modes of living, reputations, and other characteristics, household-level
 2 information cannot be used to draw conclusions about individual consumers.²

3 Lastly, Tesla's (correct) understanding of FCRA certainly does not create a "loophole" (Supp.
 4 Opp. at 9) in the Act's protections. FCRA regulates the dissemination and use of consumer credit
 5 reports containing personal information about individuals, and it was never intended to reach general
 6 facts solely about a household, much less an entire neighborhood. Such generalized information is
 7 appropriately outside its scope.

8 **5. Plaintiff's Attempt to Distinguish Tesla's Case Law Is Unavailing.**

9 Plaintiff also has no answer to Tesla's on-point case law. In *Arcidiacono v. American Express*
 10 Co., the court held that lists assigning consumers to broad categories based on their "actual credit card
 11 use" were not consumer reports because they were used for marketing, which the court correctly
 12 recognized, as Tesla explained above, is not a FCRA-regulated purpose. No. 92-3428, 1993 WL
 13 94327, at *1-4 (D.N.J. Mar. 29, 1993). In so holding, the court adopted the narrower definition of
 14 "business transaction" embraced by the Ninth Circuit in *Mone* and held that "'a consumer relationship
 15 must exist between the party requesting the report and the subject of the report'" in order for the report
 16 to qualify as a "consumer report." *Id.* at *2 (quoting *Houghton*, 795 F.2d at 1149)). The court reasoned
 17 that "the relationship between a mailer of promotional materials and the recipient of those materials is
 18 not a type of 'consumer relationship' regulated by" FCRA. *Id.* at 3 n.6. Additionally, contrary to
 19 Plaintiff's assertion (Supp. Opp. at 7), the court declined to address any tension between the *Greenway*
 20 decision on which Plaintiff relies and Third Circuit precedent because "the holding in that case is not
 21 inconsistent with a narrow reading of the phrase 'a business transaction involving the consumer.'"
 22 *Arcidiacono*, 1993 WL 94327 at *2 n.3. Moreover, as shown above, Plaintiff's claim that the lists in
 23 *Arcidiacono* are distinguishable from the Mosaic Score because the Mosaic Score provides "individual
 24 specific credit information" is incorrect. Like the lists in *Arcidiacono*, the Mosaic Score groups
 25 consumers into categories by household or neighborhood and does not provide individual-specific

27 ² To the extent Plaintiff is arguing that his own Mosaic Score provided individual-level information
 28 due to the size of his household, he does not allege that his assigned category was based on household
 (as opposed to neighborhood) data, or that he lived alone.

1 information. (*See supra* Section II.A.4.) *Arcidiacono* therefore provides strong support for the
 2 conclusion that the Mosaic Score is not a “consumer report.” (Mot. at 23.)

3 Similarly, in *Reynolds v. LeMay Buick-Pontiac-GMC-Cadillac, Inc.*, the court found that
 4 reports providing the names and addresses of persons emerging from bankruptcy that were used to
 5 generate mailing lists were not “consumer reports” because the mailers “made no difference in
 6 determining eligibility for credit.” No. 06-c-292, 2007 WL 2220203, at *3 (E.D. Wis. Jul. 30, 2007).
 7 Plaintiff’s claim that the reports in *Reynolds* are distinguishable from a Mosaic Score because the score
 8 provides “a laundry list of information about the consumer that is not only specific to the individual,
 9 but is significant [sic] factors in making credit determinations” mischaracterizes the Mosaic Score and
 10 is unsupported by the FAC, as discussed above. Moreover, like the reports in *Reynolds*, the Mosaic
 11 Score was used for marketing, not for determining eligibility for credit. (*See supra* Section II.A.1.)
 12 Thus, like the reports in *Reynolds*, the Mosaic Score is not a “consumer report.” (Mot. at 23-24.)

13 **B. Plaintiff’s Assertion That the Use of a Mosaic Score for Marketing Makes It a
 14 FCRA-Regulated “Business Transaction” Is Incoherent and Defeats His Claims.**

15 As discussed, Plaintiff claims that the Mosaic Score is a “consumer report” because Tesla used
 16 it for marketing, which Plaintiff asserts qualifies as a use in connection with a FCRA-regulated
 17 “business transaction” under Section 1681b. (Supp. Opp. at 4.) Plaintiff is wrong, as shown above.
 18 But, if his argument were accepted, he still could not state a FCRA claim, because consent is ***not
 19 required*** if a consumer report is used in connection with the only “business transaction” FCRA
 20 governs, which is “a business transaction that is initiated by the consumer.” 15 U.S.C.
 21 § 1681b(a)(3)(F)(i), 1681b(f)(1) (expressly authorizing use consumer reports for any purpose in
 22 Section 1681b); *see Jones v. Best Serv. Co.*, No. 14-9872, 2017 WL 490902, at *8 (C.D. Cal. Feb. 6,
 23 2017) (“[A] credit report can be accessed without a consumer’s permission for other permissible
 24 purposes’ under the FCRA.”); *Salmas v. Portfolio Recovery Associates, LLC*, No. 13-0575-, 2013 WL
 25 6182614, at *3 (C.D. Cal. Nov. 25, 2013). Plaintiff has so badly misinterpreted FCRA that he has
 26 argued himself out of his claim. In his contortions to show (contrary to the FAC) that the Mosaic
 27 Score is a consumer report, he inadvertently established that Tesla did not need his consent to get it.

28 Plaintiff argues that “[a]lthough Tesla utilized the Mosaic Score for a legitimate need, Tesla

1 did so without consumer consent in violation of the FCRA.” (Supp. Opp. at 4.) For support, Plaintiff
 2 cites a FTC Advisory Opinion addressing “the propriety of an auto dealership obtaining a consumer
 3 report from a consumer reporting agency (‘CRA’) on an individual who visits the showroom.” (*Id.*;
 4 P’s RJN, Ex. B at 1.) Plaintiff’s reliance is flatly misplaced. The FTC Advisory Opinion affirms that
 5 “written permission” is unnecessary where the dealer has a “legitimate business need” in connection
 6 with a “business transaction initiated by the consumer.” (P’s RJN, Ex. B. at 1-2.) Thus, if the Court
 7 accepts Plaintiff’s argument that Tesla’s use of the Mosaic Score for “marketing and sales purposes”
 8 was for a “legitimate business need” in connection with a “business transaction initiated by the
 9 consumer” as described in Section 1681b (*see* Supp. Opp. at 4), it must also find that no consent was
 10 required. (*See* 15 U.S.C. § 1681b (f)(1); P’s RN, Ex. B. at 2.)

11 *****

12 Plaintiff’s FCRA claims fail as a matter of law. Plaintiff has no allegations establishing that
 13 the Mosaic Score is a FCRA-regulated consumer report, Plaintiff’s characterizations of the FAC are
 14 false and misleading, Plaintiff’s resort to extrinsic evidence is improper and unavailing, and Plaintiff’s
 15 machinations to show that Mosaic is a consumer report led him to shoot himself in the foot.

16 **C. Plaintiff’s DPPA and ECPA Claims Should Be Dismissed with Prejudice.**

17 Plaintiff concedes his DPPA claim is meritless and does not oppose dismissal (Supp. Opp. at
 18 1, 9.) He also makes no attempt to further defend his ECPA claim, which should be dismissed with
 19 prejudice for the reasons described in Tesla’s original Motion and Reply. (*See* ECF Nos. 63, 74.)

20 Additionally, the arguments in Plaintiff’s supplemental brief regarding FCRA actually
 21 *undermine* his ECPA claim. In discussing his FRCA claim, Plaintiff concedes that Tesla had a
 22 legitimate purpose in using the Mosaic Score. (*See, e.g.*, Supp. Brief at 4.) It is impossible to square
 23 this statement with his earlier argument that, for the ECPA claim, Tesla had an “improper purpose”
 24 for the alleged interception. (Opp. at 20.) Given this new contention that Tesla, in fact, had a
 25 “legitimate” purpose, the Court clearly should dismiss Plaintiff’s ECPA claim with prejudice.

26 **III. CONCLUSION**

27 Plaintiff’s claims fail as a matter of law, and the FAC should be dismissed with prejudice.

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1 Dated: January 31, 2020

COOLEY LLP

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